TANG KONG MENG

v.

ZAINON BT. MD ZAIN & ANOR.

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J
[ORIGINATING SUMMONS NO. 24-1027-93 & 24-463-94]
15 JUNE 1995

FAMILY LAW: *Custody of infant - Whether natural parents should have custody - Welfare of the child - Section 24 Courts of Judicature Act 1964.*

FAMILY LAW: *Adoption - Whether all the requirements for adoption fulfilled - Whether adoptive parents had custody over child before registration of adoption - Whether "custody" means physical custody or legal custody - Whether child was maintained by adoptive parents before adoption - Section 6 Registration of Adoption Act 1952.*

On 3 December 1986, a female child Alvina was born to Tang Kong Meng and Chong Mo Mooi (f). Both were not married to each other as Tang was still married to another lady. When Alvina was 3 months old, Tang and Chong found Zainon and Suhaimi to be the baby sitters for her. Each of Alvina's natural parents visited her from time to time and Chong paid Zainon the baby-sitting charges. At the end of 1990, Chong agreed to allow Zainon and Suhaimi to adopt Alvina and convert her to Islam. An application to the Registrar of Adoption, Gombak was made on 8 December 1990 to adopt Alvina together with a letter of consent from Chong. Exercising her discretion dispense to with Tang's consent, the Registrar registered the adoption of Alvina to Zainon and Suhaimi on 11 May 1991. Alvina was then converted and given the name Noralvina bte Abdullah.

In November 1991, Tang visited Alvina but the adoption and conversion was concealed from him. In June 1992 he took Alvina away to his sister's house in Menglembu, Perak and later enrolled her in a Chinese school. Upon learning that the police were looking for him for the alleged kidnapping of Alvina, he surrendered himself and Alvina to the authorities. Alvina was returned to Suhaimi and Zainon.

By O.S. No. 24-1027-93, Tang claimed a declaration that he is lawfully entitled to the custody and care of Alvina and a declaration that Alvina receiving religious instruction in the Islamic faith was in contravention of Art. 12(4) of the Federal Constitution. He also prayed that Alvina be delivered to him. Suhaimi and Zainon, by O.S. No. 24-463-94 sought a declaration that the adoption of Alvina was lawful and claimed a right to custody of Alvina.

Zaiton argued that since Alvina was an illegitimate child, Chong had exclusive care and custody as the natural mother and could consent to the adoption and the legal adoption gave them the right to convert Alvina. Tang argued that Chong had deserted Alvina and thereby abandoned her legal right to grant consent for the adoption. Such a right lay with Tang and he did not exercise it. Further Tang argued that all the requirements of s. 6 of the Registration of Adoption Act were not fulfilled during Alvina's adoption as Zainon and Suhaimi did not have custody of her nor did they maintain her at the time.

Held:

[1] The natural mother of an illegitimate child has the obligation to maintain the child and is entitled to exclusive care. On the evidence, Chong did not abandon her rights as she continued to visit Alvina and gave money for Alvina's maintenance right up to the time of adoption. She can, therefore, give her consent to Alvina's adoption.

[2] Section 6(1) of the Registration of Adoption Act requires the adopting parents to have custody for a continuous period of two (2) years before registration. "Custody" means physical custody and there is no doubt that Suhaimi and Zainon had physical custody for more than two years before the application for adoption.

[3] The adopting parents are also required to maintain the child before the adoption. The evidence both oral and documentary showed that both Suhaimi and Zainon were paid monetary consideration by Tang and Chong throughout the period before the registration of adoption, for Alvina's maintenance. Since the requirements in s. 6(1) are conjunctive in nature, failure to satisfy any one condition results in the adoption of Alvina being null and void. The registration is ordered to be deleted from the register of adoptions.

[4] Thus, Suhaimi and Zainon not being Alvina's parents or guardians could not decide on Alvina's religion as she was at the time of conversion still under 18 years of age as per Art. 12(4) Federal Constitution. Therefore, Alvina should not receive further religious instructions or take part in any ceremony or act of worship of the Islamic faith.

[5] Chong has no interest to regain physical possession of Alvina. Tang cannot physically be with Alvina or spend sufficient time with her and would be unable to provide tender loving care. Since the welfare of the child is of paramount importance, Suhaimi and Zainon are appointed guardians by the Court as they have doted on Alvina and have looked after her practically since birth. However, the appointment does not provide them with the right to decide Alvina's religion.

[6] Tang and Chong respectively are granted access to Alvina once a month.

[Registration of adoption declared null and void, Alvina not to receive further religious instructions in the Islamic faith. Zainon and Suhaimi appointed guardians].

Cases referred to:
R v. Brighton (Inhabitants) [1861] 1 B&S 447 ***(refd)***
Horner v. Horner [1979] 1 Hag. Con. 337 ***(refd)***
T v. O [1993] 1 MLJ 168 ***(foll)***
Tam Ley Chian v. Seah Heng Lye [1993] 3 MLJ 696 ***(foll)***

Legislation referred to:
Adoption Act 1952
Civil Law Act, s. 27
Courts of Judicature Act 1964, s. 24
Federal Constitution, Art. 12(4)
Registration of Adoption Act, 1952, s. 6, (1)

Other sources referred to:
English Oxford Dictionary
Halsbury, Vol. 5(2), para. 729, p. 413

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Mohamad Ibrahim; M/s. Mohamad Ibrahim & Co.

JUDGMENT

James Foong J:

These two cases were consolidated for trial as the subject matters involved are similar. In Originating Summon No. 24-1027-93, the plaintiff Tang Kong Meng @ Tang Meng (Tang for short), is seeking *inter-alia:*

(1) A declaration that he is lawfully entitled to the custody and care of his daughter Alvina Tang Mei Kwan (Alvina for short);

(2) A declaration that Alvina in receiving religious instructions in or in taking part in any ceremony or act of worship of the Islamic faith is in contravention of Art. 12(4) of the Federal Constitution;

(3) That the 1st defendant, Zainon bte Md Zain (Zainon for short) and the 2nd defendant Suhaimi bin Shamsudin (Suhaimi for short) do deliver to Tang, Alvina.

On the other hand, in Originating Summons 24-463-94, Suhaimi is seeking a declaration that the registration of the adoption of Alvina under the Registration of Adoption Act 1952 is lawful, and the right to custody of Alvina be granted to Suhaimi. In this originating summons, the defendant named is Tang.

Besides affidavits filed by the relevant parties in both these cases, *viva voce* evidence were also adduced from the respective parties including their witnesses. This, as agreed by all parties would enable this Court to be in a better position to evaluate the evidence which is so necessary in a case of this nature, where human feelings of the parties in particular, and the racial and religious sensitivity of the two major races in our country in general are involved; not forgetting the paramount importance of the welfare of a young girl, Alvina.

In brief, the facts of this case are as follows. On 3 December 1986, Alvina, a female was born to one Chong Mo Mooi (Madam Chong for short) and Tang. They were not married at that material time as Tang was then still married to another lady. When Alvina was only 3 months old, according to Madam Chong, she handed her to Zainon and Suhaimi to be looked after in a manner as a baby sitter at a charge of RM180 per month. Tang on the other hand asserted that it was Madam Chong together with him who found Zainon and Suhaimi to be the baby sitter. After careful consideration of the evidence, this Court is more inclined to believe the latter's version. Soon after this took place, Tang and Madam Chong parted ways, but nevertheless each visited Alvina from to time, and according to Madam Chong she continued to pay Suhaimi and Zainon the charges for baby sitting Alvina.

In 1990, Tang went to Singapore to work. According to both Suhaimi and Zainon, Tang did return to visit Alvina in 1991 and on one occasion stayed in Suhaimi and Zainon's house for 2 to 3 nights sleeping with his daughter Alvina.

Towards the end of 1990, Madam Chong who had also been visiting Alvina on and off agreed to allow Suhaimi and Zainon to adopt Alvina, and to convert her in the Islamic faith. With this, both Suhaimi and Zainon made application to the Registrar of Adoption (Registrar for short) at Daerah Gombak, Selangor, under the Registration of Adoption Act 1952 to adopt Alvina on 8 December 1990. This application was processed together with a letter of consent to the adoption signed by Madam Chong. However, in the application form, though Tang's name was inserted, his particulars such as race, religion, place of birth and more importantly, his address was left blank. According to the DW4, the

Registrar, she could only interview Suhaimi and Zainon and Madam Chong, leaving out Tang since his whereabouts was unknown and not disclosed. As the necessary ingredients for the adoption under the Registration of Adoption Act had been fulfilled, and by exercising her discretion as provided under the said Act to dispense with the consent of any parent, she registered the adoption of Alvina in the register of adoption on 11 May 1991. Practically on the same day, Alvina was converted to the Islamic faith and was given the name of Noralvina binti Abdullah.

In 1991 November, according to Suhaimi, Tang did come to visit Alvina. The adoption and conversion of Alvina to Islam was concealed from Tang. Then came June 1992 when Tang took Alvina away from Suhaimi and Zainon to reside in his sister's house in Menglembu, Perak. By October 1992, Alvina was enrolled into a Chinese school. Almost round this time, Tang came to understand from his brother in Kuala Lumpur that the police were looking for him for the alleged kidnapping of Alvina. Upon this, he immediately surrendered himself and Alvina to the authorities. Since then, Alvina was returned to Suhaimi and Zainon and the series of these cases began. Alvina is now 6 years of age.

Encik Ibrahim, Counsel for Suhaimi and Zainon urged this Court to uphold the adoption as not only all the necessary ingredients under s. 6 of the Registration of Adoption Act have been fulfilled but, since Alvina was an illegitimate child, Madam Chong being the natural mother has the exclusive care and custody over her, which includes consent to the adoption. As Alvina was legally adopted, Suhaimi and Zainon who consequently became her parents can give the necessary consent for Alvina to be converted into the Islamic faith.

Encik Karpal Singh, Counsel for Tang however argued that from the evidence of Tang, Madam Chong left him and Alvina when Alvina was 3 months old. By this desertion, Madam Chong had abandon her legal right and since then, Tang had assumed the role of a guardian to Alvina. By this, Madam Chong had no authority and right to grant consent for the adoption; any such right lay solely with Tang, and he had not exercised it. Further, Encik Karpal Singh claimed that not all relevant factors as required under s. 6 of the Registration of Adoption Act had being fulfilled at the time of Alvina's adoption. Suhaimi and Zainon did not have custody of Alvina nor did they maintain her at the material time of adoption. Based on the testimony of Tang, he had since 1986 maintained Alvina by paying Suhaimi and Zainon their charges, and some of these payments are evidenced by vouchers and bankers receipts of payments to Zainon. As there was non compliance of two of the ingredients set out in s. 6 of Registration of Adoption Act the registration of this adoption is invalid, thus extinguishing Suhaimi's and Zainon's consent to have Alvina converted to Islam. Consequently, Alvina should be returned to Tang for custody.

There is never a dispute in this case that Alvina is an illegitimate child of Madam Chong and Tang. Being an illegitimate child, even Encik Karpal Singh has candidly admitted that the putative father has no legal right over the child under civil law, and the natural mother has the obligation not only to maintain the child, but is also entitled to exclusive care. (See the case of *R v. Brighton (Inhabitants)* [1861] 1 B&S 447; *Horner v. Horner* [1979] 1 Hag. Con. 337 which were accepted in our Malaysian Courts in *T v. 0* [1993] 1 MLJ 168 and *Tam Ley Chian v. Seah Heng Lye* [1993] 3 MLJ 696). This must be the state of law for under s. 27 of the Civil Law Act, provides that:

> All cases relating to custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act (the Civil Law Act), regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

When Madam Chong had the exclusive care over Alvina, the next issue is whether she did abandon such rights as alleged by Tang, and the same was picked up by Tang to be Alvina's guardian. After viewing the evidence as a whole, this Court finds that Madam Chong did not abandon such rights. Though she was separated from Tang, she continued to visit Alvina throughout, and even gave Suhaimi and Zainon money for Alvina's maintenance right up to the time of the adoption. Having such right, she can give her consent to the registration of Alvina's adoption.

Consent for adoption under the Registration of Adoption Act is only one of the many factors to qualify to complete the adoption process under this Act; there are also other qualifications. In order to examine these, it is best to reproduce s. 6(1) of the said Act:

> s. 6(1) where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any *de facto* adoption, and has for a period of not less than two years continuously and immediately before the date of such application been and has been in such custody so brought up, maintained and educated, the Registrar may, upon the application, in the form in the First Schedule, of such person or spouses, register the adoption if -
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> (a) such person or spouses and the child shall appear before the Registrar and shall produce to the Registrar such evidence either oral or documentary as may satisfy the Registrar that such adoption took place;
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> (b) the parents or one of the parents, or, if both the parents are dead or if neither of the parents is within West Malaysia, any guardian of the child shall appear before the Registrar and express consent to the adoption:
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> Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signed his consent by statutory declaration; and
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> (c) the prescribed fees are paid.

Here, two requirements are singled out for scrutiny by this Court in the light of this case. The first, is the 'custody' factor. Did Suhaimi and Zainon have custody over Alvina for a continuous period of two years before the registration of the adoption? By custody one could have argued that it was legally with Madam Chong; Suhaimi and Zainon had only the physical custody. Madam Chong's legal custody was derived from the fact that she is the natural mother of an illegitimate child. With the meaning of custody in a state of uncertainty (see *Halsbury* vol. 5(2) para. 729 at p. 413), as being used in various context to connote different purpose, and the Registration of Adoption Act or other relevant Malaysian enactments giving no definition to its meaning, this Court can only deduce it to mean physical custody in this case. The whole objective for the enactment of the Registration of Adoption Act seems to be to cater for *de facto* adoption. The word "*de facto*" according to the English Oxford dictionary is defined as "in fact; whether by right or not; as if". By this, a person seeking adoption naturally must have physical custody of the child for a period of not less than two years. If he is seeking adoption of the child when legal custody is already in his possession, then the procedure to follow should

be under the Adoption Act of 1952, where a more elaborate process is required culminating to a final sanction by a Court of law. From the facts of this case, there can be no doubt that Suhaimi and Zainon had physical custody of Alvina for more than two years before the application for adoption, and as such, this Court is of the view that they had "custody" over the said child at the material time as is required by s. 6(1) of the Registration of Adoption Act.

The second factor is whether Alvina was "maintained" by Suhaimi and Zainon before the adoption as is required under s. 6 of the Act. Though both Suhaimi and Zainon denied receiving any maintenance from Madam Chong and Tang after the first three months when Alvina was handed to them, it cannot override the explicit testimony of Madam Chong who stated that that she paid for Alvina's maintenance right up to the time of adoption, and these payments were made to Suhaimi and Zainon. It must be borne in mind that Madam Chong was called to testify for Suhaimi and Zainon and her evidence, if at all bias, should be for Suhaimi and Zainon, but not to their disadvantage. In addition to this, there are vouchers signed by Zainon acknowledging receipt of money from Tang to maintain Alvina for a period both before and after the registration of the adoption. Zainon initially attempted to explain that she received no such sums from Tang, but eventually changed her version to that of not knowing what she was signing or that these vouchers were blank. Unfortunately, all these added to more blunders and contradictions as she proceeded in her attempt to conceal the truth.

With overwhelming oral and documentary evidence, this Court cannot, but find both Suhaimi and Zainon were paid monetary consideration by Madam Chong and Tang throughout the period before registration of adoption for the maintenance of Alvina. With such payments, Suhaimi and Zainon could not have been considered to have maintained Alvina as is required under s. 6(1) of the Act. Since the requirements under s. 6(1) are conjunctive in nature, failure to satisfy any one condition would result in the registration of the adoption of Alvina to be void *ab initio.* In this case, as this Court has found that Suhaimi and Zainon did not maintain Alvina during the entire period of custody they had her right up to the time of the registration of the adoption, the registration of Alvina's adoption under the said Act is hereby declared null and void. This Court accordingly orders that such registration be deleted from the register of adoption. Consequently, this Court hereby dismisses Suhaimi's and Zainon's originating summons in Case No. 24-463-94 with cost.

Without this registration of adoption, Suhaimi and Zainon not being Alvina's parents or guardian could not decide on the religion of Alvina as she was at the material time of conversion to Islam still under the age of 18 years. This is provided for under Art. 12(4) of the Federal Constitution which reads as follows;

> Art. 12(4) For purpose of cl. (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

By this provision, this Court hereby allows Tang's prayer in Case No. 24-1027-93 to declare that Alvina should not receive further religious instructions in or to take part in any ceremony or act of worship of the Islamic faith.

Now, what is more fundamental is the issue of custody of Alvina. Madam Chong, though in law has a better right being the natural mother of an illegitimate child did expressly state that Alvina would have a better life with Suhaimi and Zainon, and for this she consented to their adoption of Alvina. Obviously, she has no interest, intention and the ability to regain physical possession of Alvina. Coupled with her background, having two

other illegitimate children by two different men besides Tang, and with her limited financial resources, she is certainly in no position to look after Alvina. As for Tang, he may be in a more stable financial situation, but he works in Singapore and cannot be physically with Alvina or spend sufficient time with her. It is the strong feeling of this Court that Alvina having gone through these traumas so early in life would require much tender loving care both of a physical and mental nature. This, in the opinion of this Court Tang is unable to provide, and as evidenced from the period he had physical custody of Alvina in June to October of 1992, he deposited her with his sister in Menglembu, Perak to be looked after and no sooner he was off.

In considering the question of custody, the welfare of the child is of paramount importance. With this fundamental principle in mind, one can only turn to Suhaimi and Zainon who have taken care of Alvina since the age of 3 months. They have, as no parties to this case have disputed, doted on Alvina to the extent of even refusing to part with her. They wanted her to be one of their own children and this is understandable for they have looked after her practically since birth. Though some customs and religious practice between Zainon and Suhaimi and that of what Alvina was born into are different, but within a progressive Malaysia where racial harmony and unity have achieved significant progress, such differences can be, and should be overlooked to accommodate the future welfare of Alvina which is of paramount importance. Such be the case, this Court with the agreement and consent of Zainon and Suhaimi appoints them as Court's appointed guardians to Alvina. This power to do so is provided for under s. 24 of the Courts of Judicature Act 1964 which reads as follows;

> Jurisdiction to appoint and control guardians of infants and generally over the person and property of infants.

Attached to this appointment, this Court hereby also directs that:

(a) both Tang and Madam Chong respectively being the natural father and mother of Alvina be each granted access to Alvina once a month on a weekend commencing Saturday at 10.00 a.m. and returning her before 7.00 p.m. on a Sunday; with liberty to apply and,

(b) that this appointment does not provide Suhaimi and Zainon with the right to decide on the religion of Alvina nor should she take part in any ceremony or act of worship of the Islamic faith until this Court orders otherwise.